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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-2019

MAILMAN DEVELOPMENT CORPORATION
and GAC CORPORATION

Petitioners,

v.

CITY OF HOLLYWOOD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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July 15, 1974

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No._____

MAILMAN DEVELOPMENT CORPORATION
and GAC CORPORATION
Petitioners,

v.

CITY OF HOLLYWOOD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

That petitioners MAILMAN DEVELOPMENT CORPORATION and GAC CORPORATION respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Florida entered in this proceeding on April 17, 1974.

OPINION BELOW

The opinion of the Supreme Court of Florida, which is reported at 293 So.2d 717, appears in Appendix I hereto. The opinion rendered by the District Court of Appeal, Fourth District of Florida, which is reported at 286 So.2d 614, appears in Appendix II hereto.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on April 17, 1974, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Where a Court is faced with a municipal zoning ordinance which is so restrictive as to amount to a taking of property, must the Court strike the ordinance down or may it alternatively offer to permit the ordinance to stand subject to the payment of compensation for inverse condemnation?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States of America the pertinent provisions of which are:

> *** nor shall private property be taken for public use without just compensation.

and Section 1 of the Fourteenth Amendment thereof:

> *** nor shall any State deprive any person of *** property, without due process of law; . . .

STATEMENT OF CASE

The Petitioners alleged in a complaint in the Circuit Court of Broward County, Florida, that in 1969 they had paid in excess of $37,000,000 to buy some 900 acres of land in that county for development as a residential unit. (All of these factual allegations are summarizied from the complaint because there has been no trial in the court of first instance.)

Then, after the purchase in 1969 and prior to March of 1972, petitioners expended in excess of $24,000,000 on improvements, plans, public dedications, purchase

of additional land, interest and taxes for the development. All of this was done while zoning regulations permitted the development.

Next in March of 1972, the City of Hollywood enacted a "density cap" (a limit on the number of residential units allowable per acre) which effectively destroyed the development and deprived the petitioners of substantially all the value of their expenditures from 1969 to March of 1972.

After the "density cap" was enacted, the Petitioners sued the City of Hollywood alleging in one count of the complaint that the Petitioners were entitled to compensation for inverse condemnation resulting from the zoning ordinance imposing the "density cap".

The federal constitutional question regarding increase condemnation was raised by Amended Count V which reads:

AMENDED COUNT V

As a direct and proximate result of the adoption by Defendant of the New Ordinance and the attendant frustration of the Project, the Plaintiff was deprived (a) of the reasonable use of the Property out of all proportion in relation to any value to the Defendant from density limits and (b) of substantially all the value of previous expenditure for acquisition of and improvements on the Property, consequently, Defendant has exercised control over, appropriated, confiscated and condemned Plaintiff's property without just compensation and without due process of law contrary to the Constitution and laws of the United States of America and the State of Florida and the Plaintiff is entitled to have a jury trial to determine its compensation.

The entire extant complaint appears in Appendix III hereto)

The trial court dismissed the count seeking compensation for inverse condemnation (the order appears in Appendix IV hereto) while refusing to dismiss counts alleging general unconstitutionality of the zoning ordinance, unconstitutionality of the ordinance in application to Petitioner's property and claiming the city was equitably estopped from enforcing the zoning ordinance as to petitioner's property. (These latter counts are still pending in trial court and are set for trial later this year).

The Petitioners appealed the dismissal of the inverse condemnation count (the pertinent portions of the assignments of Error appear in Appendix V hereto) and certain other matters to the District Court of Appeal, fourth District of Florida, which Court affirmed the action of the Trial Court. The germane portions of the opinion reads:

> Amended Count V alleged that as a result of the adoption of the new ordinance, appellee-City had in effect taken appellant's property without just compensation thereby entitling appellant to a jury trial to determine its compensation. Under our present constitution, Article X, Section 6, no private property shall be taken except for public purposes and with full compensation to the owner. But there is a clear distinction between the appropriation of private property for public use in the exercise of the power of eminent domain, and the regulation of the use of property under the police power exercised to promote the health, morals and safety of the community. State Plant Board v. Smith, Fla. 1959, 110 So.2d 401. See also, 1 Nichols on Eminent Domain (3rd Ed.) pp. 69-70, Section 14.2(2). We hold that enactment of a zoning ordinance under

the exercise of police power does not entitle the property owner to seek compensation for the taking of the property through inverse condemnation. Cf., City of Miami v. Romer, Fla. 1952, 58 So.2d 849. If the zoning ordinance as applied to the property involved is arbitrary, unreasonable, discriminatory or confiscatory (as appellant has alleged in other counts still pending before the trial court), the relief available to the property owner is a judicial determination that the ordinance is either invalid, or unenforceable as pertains to plaintiff's property.

The Petitioners then filed a Petition for Writ of Certiorari with the Supreme Court of Florida attacking the affirmance by the District Court of Appeal of the dismissal by the trial count of the inverse condemnation count. The Supreme Court of Florida denied that Petition.

REASON FOR GRANTING WRIT

The Petitioners respectfully submit that this petition is especially well suited to serve as a vehicle for resolving the important public question of how to reconcile significant private property rights, with the need for dramatically enlarged use of the police power to protect and enhance the environment, .

Man's demands on the environment have reached a point where urgent regulatory action is necessary to preserve the environment. A perusual of the opinions of this Honorable Court reveal significant recent cases dealing with the environment, e.g. *Sierra Club v. Morton,* 405 U.S. 727; *U.S. v. SCRAP,* 412 U.S. 669; and *Zahn v. International Paper Co.,* 38 L. Ed. 2d 511, No. 72-888.

The exact perimeters of police power action have never been determined, in fact it may be they can never

be definitively determined. As this Honorable Court said in *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 594:

> "This is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation. *** There is no set formula to determine where regulation ends and taking begins.

The problem is that Courts now face the dilemma of striking down a needed but oppressive zoning ordinance or letting it stand to the deprivation or even destruction of the property and its owner.

One of the things that makes this case a sound vehicle for determining if there are alternatives to this dilemma is the fact that since this Petition arises from the dismissal of conclusionary allegations in a complaint rather than definitive findings of fact, granting the Petition would not involve the setting of rules and perimeters in this threshold case in a new but important area of the law — use of land control regulations to preserve the environment. See, Sax, Takings and the Police Power, 74 Yale L. J. 36 (1964).

Instead, granting the Petition would merely give the Courts an additional tool with which to assist the municipalities in their efforts to protect the environment. See, Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria 44 So Cal. L. R. 1971.

Because of the posture of this case there is no need to concern ourselves here with whether petitioners have, in fact suffered such a destruction of property by the use of the police power and likewise, neither the wisdom

nor the necessity of the ordinance has to be questioned here. The sole issue in this petition concerns whether petitioners should have their day in court on the question of whether they are entitled to compensation for a destruction of property by the use of the police power.

Historically, zoning has been used in America as a method of allocating all of the land to its most appropriate use. Basically a use which would be beneficial to its owner and similar to the surrounding neighborhood or district (*see* generally the discussion in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, at 388, 1926). The comment that a ". . .nuisance may be merely a right thing in the wrong place, — like a pig in the parlor instead of the barnyard", *ibid,* at 388 contained the implicit notion of full utilization of all land in similar use districts.

Because of the historical practice of allocating a use to all land, and doing it on the basis of similarity of surrounding neighborhoods, case law has centered principally around landowner efforts to get a more valuable zoning.

Thus, on the lower east coast of Florida, as large apartments and hotels came to surround or abut residential properties, the surrounding or abutting apartment or hotel property caused the value of property zoned residential to rise beyond that value which residential zoning supported. This was regarded as justifying an upgrading in the zoning of the residential property to something more valuable than residential. See for example, *Tollius v. City of Miami,* 96 So.2d 122 (Fla. 1957), *Miami Shores Village v. Bessemer Properties, Inc.,* 54 So.2d 108 (Fla. 1951), and *Watson v. Mayflower Property, Inc.,* 177 So.2d 355 (Fla. 2nd D.C.A. 1965). In

effect, similar lands in a given area were considered to be entitled to the same use. In other words, as one's neighbors got the benefits from building large hotels or apartments, the then conventional zoning wisdom said one was also entitled to a zoning change so one could also realize these benefits.

Reduced to their net effect, until very recently most zoning cases have, therefore, really looked primarily at whether someone was going to realize a speculative increase in the value of property by obtaining a variance or rezoning which would make the property more valuable than its then current zoning or permitted use.

This approach led to a concentration of high-rises on the Florida seaboard which supposedly have created density problems. These suppositions have caused some persons to question the desire-for-growth syndrome that had basically motivated Florida's (and the nation's) action since the early 20's.

Where, as in Hollywood, Florida, and countless other cities across the United States, this questioning of growth has led to efforts to block growth, parties such as the Petitioners now unexpectedly find the formerly prevailing situation to be reversed. Zoning case law has traditionally meant that since one's neighbors had realized the full benefits of their land, then all the more reason that one was entitled to realize the benefit of his land. Suddenly Hollywood and many localities have came to feel the situation should be the exact converse. Unless compensation is allowed, this zoning ordinance could mean that since Petitioners' neighbors have realized the benefits of their land, then for that very reason, the Petitioners are not entitled to realize the benefits of theirs.

The reason for this is the fact that the trial court now has only 2 alternatives — overturn the ordinance with possible resultant havoc to the public or uphold the ordinance with possible economic destruction to Petitioners' property. Due process demands that the courts have a middle course.

The Count in the Petitioners' Complaint under consideration does not deal with the wisdom or necessity of the downward change. Instead, Count V addresses itself to the fundamental question of what remedies might be available in testing the economic loss attendant to the policy of reducing intensity of land use.

Because courts were looking at whether the value of property should be upgraded by zoning, and looking at neighboring uses, they never had to seriously address this question. Thus, we should not place an overemphasis on previous definitions of "taking" such as that found in Northcutt v. S.R.D., 209 So.2d 710 (Fla. 3rd D.C.A. 1968).

Of course, granting this Petition would not result perforce in a redefinition of such a "taking" by this Court. Granting this Petition would only mean that the Florida trial court should look at the question of what constiutes a "taking" as to which it could grant alternative relief.

"Zoning with compensation" regulations combining the power of eminent domain with the police power by providing for the payment of damages to a property owner whose property is damaged as a result of the land-use restriction were developed at the end of the 19th century, when some legislatures recognized the need for land-use controls but were unsure of the extent

to which they might impose controls. Anderson, Zoning Law and Practice in New York State § 105. With judicial recognition of zoning without compensation, *Euclid v. Ambler Realty Co.*, supra, as a valid tool for restricting land use, the zoning with compensation technique fell into disuse.

We submit it is now time to judicially, rather than legislatively, examine the question of whether there is a need for a change in this restrictive and harsh approach to zoning law and we submit the constitutional bases for this change exists.

In *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958), the United States Supreme Court has said as much:

> Thus the WPB made a reasoned decision that, under existing circumstances, the Nation's need was such that the unrestricted use of mining equipment and manpower in gold mines was so wasteful of wartime resources that it must be temporarily suspended. Traditionally, we have treated the issue as to whether a particular governmental restriction amounted to a question properly turning upon the particular circumstances of each case.
>
> * * *
>
> In doing so, we have recognized that action in the form of regulation can so diminish the value of property as to constitute a taking.

It would seem from the teachings of this case that the test of one's right to compensation for acts under the exercise of the police power is a balancing of two factors: (1) the degree of impact on the property owner, on the one hand, with (2) the degree of need by the community, on the other hand. These, of course, are

fact questions which are not before this Court, but the necessity for trial on them is illustrated by noting that while the plaintiffs are not faced with being temporarily completely out of business (as Central Eureka was), the City of Hollywood by the same token may not be faced with what the nation faced in World War II.

If the density limitation ordinance is reasonable in the sense that it is needed, then why not let the trial court consider whether the whole community should bear the cost of its benefits? This question leads inexorably to the answer that if Petitioners' allegations are correct, and only a trial can so decide, the whole community (including to their proportionate extent — the Petitioners) should bear the cost, because those myriad landowners who are not affected by the density ordinance cannot claim that they have given up something of commensurate value the way *Central Eureka* at page 168 notes the whole nation was sacrificing in World War II.

In short, we say the question on which Petitioners have been denied their day in court is whether the regulation is so onerous that it is a taking which requires compensation but at the same time that the regulation is needed.

As was said in *Pa. Coal Co. v. Mahon,* 260 U.S. 393, in which the court recognized:

> "Government hardly could go on if, to some extent, values incident to property could not be diminished [through the exercise of police power] without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation, and must yield to the police power. But obviously the implied limitation must

> have its limits or the contract and due process clauses are gone. *One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.* So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power. [Emphasis added]. *Id.,* at pp. 413

That is a fact question turning on the particular circumstances of this case which deserve a trial.

In addition, the Draconian approach used in the past for zoning cases, of either allowing the zoning to stand or striking it down poses hard questions at a time when growth is being seriously re-examined—at a time, perhaps, when growth should be seriously re-examined. Such an approach permits no middle ground.

The alternative of offering inverse condemnation can be particularly useful in connection with zoning peculiarly affecting a limited area such as ours, especially where the restrictions may be inordinately harsh when applied to particular property and thus might raise questions as to whether the application constitutes a taking of property without compensation.

One of the reasons that courts seem to shy away from allowing inverse condemnation awards in zoning is a fear that public bodies will be overly cautious and perhaps err in applying zoning if they feel that if the zoning is improper they are going to have to pay compensation to the victims. There is a line of cases which holds that such is not true until such time as the courts

have held the zoning to be improper. *Kirschke v. City of Houston,* 330 S.W.2d 629 (Texas Civ. App. 1959); *Gasque v. Town of Conway,* 8 S.E.2d 871 (South Carolina 1940); *Ellis v. City of West University Place,* 175 S.W. 2d 396 (Texas 1943).

This does not seem to be a bad rule for the reason that legislation of whatever sort is presumptively correct and should be acted on as correct until such time as it has been held by the Court to be improper. *State, ex rel, Atlantic Coast Line R. Co. v. State Board of Equalizers,* 94 So. 681 (Fla. 1922).

We submit, therefore, that a writ of certiorari should be issued in this case and Amended Count V remanded for consideration by the Florida Trial Court as to whether or not there was in fact a taking as alleged and if there were such a taking then the Florida Trial Court would be afforded a tool which would take care of all situations, to-wit: the ability to enter an alternative Order directing the City to revoke the zoning or to go to trial on the issue of compensation as a result of the zoning. See the very ably reasoned dissent in *City of St. Paul v. Chi., St. P., M. & O. R. Co.,* 413 F.2d 762 (8th Cir. 1969).

The result of such a holding would not be to restrict the powers of municipalities to control zoning, but, instead, to add a tool to assist in land use control.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Florida.

JOHN R. LAWSON, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that 3 copies of the foregoing Petition for a Writ of Certiorari to the Supreme Court of Florida have been furnished by U.S. Mail prepaid on this _____ day of July, 1974 to Myron Burnstein, Home Federal Tower, 1720 Harrison Street, Hollywood, Florida 33020, Counsel for Respondent, I further certify that all parties required to be served have been served. And 3 copies to Honorable J. Bart Budetti, City Attorney, City Hall, City of Hollywood, Hollywood, Florida.

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APPENDIX I

SUPREME COURT OF FLORIDA

January Term, A.D. 1974
Wednesday, April 17, 1974

Case No. 44,993

District Court of Appeal, Fourth District

72-1159

MAILMAN DEVELOPMENT CORPORATION
and GAC CORPORATION,
Petitioners,

vs.

CITY OF HOLLYWOOD,
Respondent.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.
ADKINS, C. J., ROBERTS, ERVIN, BOYD and McCAIN, JJ., concur

APPENDIX II

In the District Court of Appeal of the State of Florida

Fourth District

July Term 1973

Case No. 72-1159

MAILMAN DEVELOPMENT CORPORATION and GAC CORPORATION,

Appellants,

v.

CITY OF HOLLYWOOD,

Appellee.

Opinion filed November 23, 1973.

Interlocutory Appeal from the Circuit Court for Broward County; Otis Farrington, Judge.

John R. Lawson, Jr., Hume F. Coleman, W. Daniel Stephens, of Holland & Knight, Tampa, and Abrams Robbins Resnick & Schneider, Hollywood, for appellants.

Myron H. Burnstein, Special Attorney, and B. L. David, City Attorney, Hollywood, for appellee.

OWEN, C. J.

By its seven-count amended complaint, appellant sought declaratory judgment, injunction and other relief. This interlocutory appeal was taken from an order dismissing three of the counts without leave to amend.

In 1969, appellant purchased approximately 900 acres of land, 200 acres of which were within the corporate limits of the appellee—City of Hollywood. Appellant planned a development consisting of multiple dwelling units, a shopping center, a hotel, and certain recreational facilities. At that time and by ordinance

subsequently adopted in 1970, the property within the corporate limits of the City of Hollywood was zoned so as to permit 60 dwelling units per acre on a portion thereof and 80 dwelling units per acre on other portions. On March 1, 1972, appellee adopted a new zoning ordinance limiting density to 25 dwelling units per acre. This suit was to secure relief from the new ordinance.

Amended Count II alleged that the new ordinance was illegal and void because there had been no changes in the circumstances relating to the zoning needs of the appellee-City between the time of the passage of the earlier ordinances and the passage of the new ordinance. A change of circumstances is not a prerequisite to the validity of an amendment to a zoning ordinance. Oka v. Cole, Fla. 1962, 145 So.2d 233; Chadwick v. Layton, Fla. App. 1963, 150 So.2d 485. Appellant's reliance upon Wager v. City of Green Cove Springs, Fla. 1972, 261 So.2d 827, is misplaced.

Amended Count V alleged that as a result of the adoption of the new ordinance, appellee-City had in effect taken appellant's property without just compensation thereby entitling appellant to a jury trial to determine its compensation. Under our present constitution, Article X, Section 6, no private property shall be taken except for public purposes and with full compensation to the owner. But there is a clear distinction between the appropriation of private property for public use in the exercise of the power of eminent domain, and the regulation of the use of property under the police power exercised to promote the health, morals and safety of the community. State Plant Board v. Smith, Fla. 1959, 110 So.2d 401. See also, 1 Nichols on Eminent Domain (3rd Ed.) pp. 69-70, Section 14.2(2). We hold that enactment of a zoning ordinance under the exercise of police power does not entitle the property owner to seek compensation for the taking of the property through inverse condemnation. Cf., City of Miami v. Romer, Fla. 1952, 58 So.2d 849. If the zoning ordinance as applied to the property involved is arbitrary, unreasonable, dis-

criminatory or confiscatory (as appellant has alleged in other counts still pending before the trial court), the relief available to the property owner is a judicial determination that the ordinance is either invalid, or unenforceable as pertains to plaintiff's property.

Count VII of the amended complaint alleged that the new ordinance was illegal and void because the City Commission failed to give reasonable consideration to the matters prescribed in Section 176.04, F.S. 1971, for the reason that the commission members (because of political obligations having nothing to do with zoning considerations) acted contrary to their convictions and good judgment. The motives of a legislative body in adopting an ordinance, legislative in character, are not the proper subject of judicial inquiry. City of Miami Beach v. Schauer, Fla. App. 1958, 104 So.2d 129 (cert. disch. Fla. 1959, 112 So.2d 838); Board of Commissioners of State Institutions v. Tallahassee Bank and Trust Company, Fla. App. 1958, 108 So.2d 74; Housing Auth. of City of Melbourne v. Richardson, Fla. App. 1967, 196 So.2d 489.

The court did not err in dismissing Counts II, V and VII of the amended complaint, without leave to amend. The order is affirmed.

AFFIRMED.

WALDEN AND CROSS, JJ., concur.

APPENDIX III

In the Circuit Court of the Seventeenth Judicial Circuit of Florida, In and For Broward County.

Case No. 72-4252

MAILMAN DEVELOPMENT CORPORATION and GAC CORPORATION,

Plaintiff,

vs.

CITY OF HOLLYWOOD,

Defendant.

AMENDED COMPLAINT

Plaintiff, MAILMAN DEVELOPMENT CORPORATION and GAC CORPORATION, sue Defendant, CITY OF HOLLYWOOD, for declaratory judgment, injunction and other relief:

1. Plaintiff, MAILMAN DEVELOPMENT CORPORATION (hereinafter referred to as "Plaintiff"), is a corporation organized and existing under the laws of the State of Florida, and has its principal place of business in Hollywood, Broward County, Florida.

2. Defendant, CITY OF HOLLYWOOD (hereinafter referred to as "Defendant"), is a municipal corporation, organized and existing under the laws of the State of Florida, located in Broward County, Florida.

3. GAC CORPORATION (hereinafter referred to as "GAC"), is a Pennsylvania corporation authorized to do business in the State of Florida. Plaintiff is a wholly owned subsidiary of GAC. Plaintiff and GAC were and are engaged in the business of acquiring property for development and construction.

4. In early 1969, GAC was shown certain property (hereinafter referred to as the "Property") consisting

of several parcels of real estate in Broward County, Florida, totaling approximately 900 acres.

5. The Property was offered to GAC by the then owners, as one complete real estate package which could be planned and constructed as a single development (hereinafter referred to as the "Project") consisting of:

(a) 18,000 multiple dwelling units and a 40 acre shopping center on the portion of the Property lying immediately west of and adjoining the Intracoastal Waterway (hereinafter referred to as the "Mailman Tract") consisting of over 400 acres described in parcel 1 of Exhibit "A" and Exhibit "B";

(b) multi-family dwelling units, a hotel, a beach and other recreational facilities on the portion of the Property adjoining the Atlantic Ocean (hereinafter referred to as the "Beach Tract") and described in parcel 3 of Exhibit "A"; and

(c) additional facilities on a third parcel.

6. The Property was only offered for sale as a unit because the highest and best use of the Property was and is the Project.

7. GAC purchased options on the Property subject to the then owners accomplishing all the prerequisites necessary for the Project.

8. The prerequisites for the Project were quieting title to a portion of the Property, obtaining agreements with the City of Hallandale, Broward County, Florida, certain neighboring landowners and Defendant concerning bridges, waterways and similar matters and obtaining appropriate zoning, all of which was essential to the Project.

9. Plaintiff purchased the Property as a unit at a cost exceeding $37,650,000 in order to complete the Project at the highest and best use of each parcel of the Property; and the prerequisites for the Project were successfully concluded.

10. Zoning needed for the Project included the uses allowed in Multiple Dwelling District RC-22 for the bulk of the Mailman Tract located in the City of Hollywood, which uses were authorized by Ordinance 0-69-166 of Defendant (attached as Exhibit "C"); and, the uses allowed in Multiple Dwelling Districts RC-46, RC-47, RC-50 and RC-51 for the Beach Tract and Additional Beach Tract in the City of Hollywood, which zoning uses were already in effect when these beach tracts were acquired by Plaintiff.

11. After all of this was done, Plaintiff then commenced the Project by procuring building permits; building streets and a bridge; commencing construction of utilities; constructing buildings; buying land to the north of the Mailman Tract so the Defendant could widen a right-of-way; dredging, filling and bulkheading; agreeing to build and maintain bridges and streets; posting a bond with the City of Hallandale for the completion of the streets, as planned; hiring architects and engineers to prepare plans and specifications; complying with requests by Defendant regarding construction of the Project; purchasing oceanfront land (hereinafter referred to as "Additional Beach Tract") described in Exhibit "G"; and paying interest and taxes.

12. All of the items in Paragraph 11 exceeded $24,600,000 in cost. All of these expenditures were made in reliance upon the zoning provided by the RC-22, RC-46, RC-47, RC-50 and RC-51 Districts. None of this would have been necessary and most of it is of no value if the Property and the Additional Beach Tract cannot be incorporated into the Project as the Original Ordinances (as hereinafter defined) allowed. Irreparable harm has and will result to Plaintiff if construction of the Project is not allowed as provided by the Original Ordinances (as hereinafter defined).

13. Subsequent to Plaintiff's purchase of the Property density was limited to 60 dwelling units per acre for the RC-22 District or the Mailman Tract and 80

dwelling units per acre for the RC-46, RC-47, RC-50 and RC-51 Districts on the beach by Ordinance 0-70-69 of Defendant (attached as Exhibit "D"). (This ordinance and 0-69-166 are hereinafter collectively referred to as the "Original Ordinances".). These densities were compatible with the Project. The Original Ordinances were enacted after extensive hearings and studies by the appropriate zoning boards and commissions of Defendant.

14. On March 1, 1972, Defendant through its City Commission, without providing notice and full and impartial hearings as provided by law, adopted zoning ordinance 0-72-26 (hereinafter referred to as the "New Ordinance") attached hereto as Exhibit "H".

15. The New Ordinance prohibits the Project because the Property and Additional Beach Tract were purchased and improvements completed on the basis Plaintiff would be allowed to construct not less than 18,000 dwelling units on the Property, or 60 dwelling units per acre in the Mailman Tract in the City of Hollywood and 80 dwelling units per acre on the Beach Tract and Additional Beach Tract zoned for multiple-family dwellings; but the New Ordinance prohibits construction in excess of 25 dwelling units on the land in the City of Hollywood zoned for Multiple Dwelling Districts. Since approximately 200 acres of the Property and Additional Beach Tract lies in the City of Hollywood, the entire Project is effectively destroyed as a result of the New Ordinance.

16. Plaintiff incorporates by reference all of the foregoing paragraphs into each of the following counts:

COUNT I

The Property and the Additional Beach Tract are not zoned in a fashion consistent with that of properties surrounding them because the properties surrounding

them are allowed a higher density than that permitted the Plaintiff by the New Ordinance. The New Ordinance is, therefore, an unconstitutional deprivation of Plaintiff's property rights without due process and equal protection of the law since it goes beyond the valid realm of regulation necessary for the public welfare, and consequently operates as an unlawful taking and confiscation of Plaintiff's property without compensation.

COUNT II

There were no changes in the circumstances relating to the zoning needs of the Defendant in the area of the Property and Additional Beach Tract between (a) the time of the passage of the Original Ordinances, the acquisition of the Property and commencement of the Project, on the one hand, and (b) the passage of the New Ordinance, on the other hand. The New Ordinance is therefore, an illegal and void rezoning to the detriment of the Plaintiff without any substantial change in the circumstances.

COUNT III

Relying on the zoning provided by the Original Ordinances, the Plaintiff purchased the Property and the Additional Beach Tract at great cost and expended considerable sums on planning, financing and constructing improvements and structures which would be fully used and useful only if the Project could be achieved. The New Ordinance would prevent completion of the Project and thus would result in a forfeiture of Plaintiff's investment. The New Ordinance is, therefore, illegal and void as applied to the property of Plaintiff and, consequently, Defendant is estopped from enforcing the New Ordinance against the Plaintiff.

COUNT IV

The New Ordinance was not passed in accordance with the law providing for notice because (a) the title as noticed and read was defective and (b) fair and impartial hearings on the proposed ordinance were not possible since the Commissioners had prejudged the

New Ordinance on criteria unrelated to zoning. The New Ordinance deprives the Plaintiff of property rights with due process of the equal protection of the law and is illegal and void.

COUNT V

As a direct and proximate result of the adoption by Defendant of the New Ordinance and the attendant (a) frustration of the Project, (b) deprivation of the reasonable use of the Plaintiff's property and (c) now fruitless expenditure on improvements, Defendant has exercised control over, appropriated, confiscated and condemned Plaintiff's property without just compensation and without due process of law contrary to the constitution and laws of the United States of America and the State of Florida and the Plaintiff is entitled to have a jury trial to determine its compensation.

COUNT VI

In the City of Hollywood different density limitations are needed for each of the various Multiple-Family Dwelling Districts because the Districts are very diverse in character, uniqueness, uses and needs depending upon where they are located in the City. Yet, the New Ordinance gives no consideration to nor makes any allowance for these differences, but instead, sets a single uniform density standard in Multiple-Family Dwelling Districts throughout the City of Hollywood. The New Ordinance is, therefore, on its face and as applied to the Property and Additional Beach Tract, arbitrary, unreasonable, discriminatory and confiscatory, and has no substantial relation to public health, safety, morals or general welfare.

WHEREFORE, Plaintiff asks the Court for some or all of the following relief:

A. Enjoin the City of Hollywood from attempting to enforce the New Ordinance against Plaintiff, after,

1. Declaring the New Ordinance unconstitutional on its face and, therefore, void and of no effect; or,

2. Declaring the New Ordinance unconstitutional as applied to Plaintiff's property, and, therefore, void and of no effect as to Plaintiff's property; or,

3. Declaring rezoning by the New Ordinance void and of no effect because there was no substantial change in circumstances; or,

4. Declaring the City of Hollywood is estopped to enforce the New Zoning Ordinance as to Plaintiff; or,

5. Declaring the New Ordinance void and of no effect because it was not adopted according to law.

B. In the alternative, declare Defendant has condemned Plaintiff's property by exercise of its right of eminent domain and that after a jury trial Plaintiff must be compensated by Defendant for the loss of its property, including costs and attorneys' fees.

C. Grant such other and further relief as the Court may deem equitable and just, including a judgment against Defendant for costs of this action.

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By _____
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and

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By _____
D. Burke Kibler, III

By _____
John R. Lawson, Jr.

By _____
Hume F. Coleman

In the Circuit Court of the Seventeenth Judicial Circuit,
In and For Broward County, Florida

MAILMAN DEVELOPMENT CORPORATION
and GAC CORPORATION,

Plaintiffs

vs.

CITY OF HOLLYWOOD,

Defendant

Case No. 72-4252

Farrington

FIRST AMENDMENT TO AMENDED COMPLAINT

The Plaintiffs amend their Amended Complaint by substituting the following Amended Counts for the correspondingly numbered counts in the Amended Complaint and adding a New Count VII, immediately following Count VI in the Complaint:

AMENDED COUNT II

Since the time of the passage of Ordinance 0-70-69, on the one hand, and the passage of the New Ordinance, on the other hand, there have been no substantial changes in the circumstances relating to the density needs of the Defendant in the area of the Property and Additional Beach Tract which would be sufficient to support the density imposed by the New Ordinance in place of the density imposed by Ordinance 0-70-69. The New Ordinance is, therefore, an illegal and void rezoning to the detriment of the Plaintiff in the face of res judicata on the density needs of Defendant.

AMENDED COUNT IV

The New Ordinance was not passed in accordance with the law providing for notice because the title as noticed and read was defective. The New Ordinance, therefore, deprives the Plaintiff of property rights without due process or the equal protection of the law and is illegal and void.

AMENDED COUNT V

As a direct and proximate result of the adoption by Defendant of the New Ordinance and the attendant frustration of the Project, the Plaintiff was deprived (a) of the reasonable use of the Property out of all proportion in relation to any value to the Defendant from density limits and (b) of substantially all the value of previous expenditure for acquisition of and improvements on the Property, consequently, Defendant has exercised control over, appropriated, confiscated and condemned Plaintiff's property without just compensation and without due process of law contrary to the Constitution and laws of the United States of America and the State of Florida and the Plaintiff is entitled to have a jury trial to determine its compensation.

NEW COUNT VII

In enacting the New Ordinance the City Commission failed to give reasonable consideration to the matters prescribed in Section 176.04, Florida Statutes, 1971, for the reason that the Commission members because of political obligations having nothing to do with zoning considerations acted contrary to their convictions and good judgment. The New Ordinance therefore is invalid in the absence of such reasonable consideration because it was enacted without compliance with the statute authorizing zoning.

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and
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Attorneys for Plaintiff

By: John R. Lawson, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing First Amendment to Amended Complaint to Myron H. Burnstein, Special Attorney, 1720 Harrison Street, Hollywood, Florida and B. L. David, City Attorney, City of Hollywood, City Hall, Hollywood, Florida on this 18th day of August, 1972 by U. S. Mail prepaid.

John R. Lawson, Jr.

APPENDIX IV

In the Circuit Court of the Seventeenth Judicial Circuit,
In and For Broward County, Florida

MAILMAN DEVELOPMENT CORPORATION
and GAC CORPORATION,

Plaintiffs

vs.

CITY OF HOLLYWOOD,

Defendant

No. 72-4252

Farrington

**ORDER OF DISMISSAL
AS TO
COUNTS II, IV, V & VII**

This cause having come on to be heard on Defendant's Motion to Dismiss the First Amendment to the Amended Complaint; and the Court having heard argument of counsel and being fully advised in the premises, it is thereupon,

ORDERED AND ADJUDGED:

That Defendant's Motion to Dismiss Amended Count II, Amended Count IV, Amended Count V and New Count VII, be and the same is hereby granted.

Twenty (20) days leave is granted to Plaintiffs to amend Amended Count IV; Amended Counts II, V and New Count VII are dismissed WITHOUT LEAVE TO AMEND.

DONE AND ORDERED in Chambers in the Broward County Courthouse, Broward County, Fort Lauderdale, Florida, this 3 day of November, 1972.

OTIS FARRINGTON
Circuit Judge

APPENDIX 4

Copies Furnished To:
Holland & Knight
Salter, Yeslow & Burnstein
B. L. David, Esquire

APPENDIX V

In the Circuit Court of the Seventeenth Judicial Circuit of Florida, In and For Broward County

MAILMAN DEVELOPMENT CORPORATION and GAC CORPORATION,

Plaintiffs

vs.

CITY OF HOLLYWOOD,

Defendant

Case No. 72-4252

Farrington

AMENDED ASSIGNMENTS OF ERROR

Plaintiffs-Appellants, MAInMAN DEVELOPMENT CORPORATION and GAC CORPORATION, through their undersigned attorneys, assign and designate as error the following judicial acts in the lower court:

* * *

2. The Court erred in granting Defendant's Motion to Dismiss Amended Count V.

* * *

5. The Court erred in dismissing Amended Count V.

* * *

FILED
AUG 9 1974
MICHAEL RODAK, JR.

in the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-2019

MAILMAN DEVELOPMENT CORPORATION and GAC CORPORATION,

Petitioners,

vs.

CITY OF HOLLYWOOD,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Florida

BRIEF FOR RESPONDENT IN OPPOSITION

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Of Counsel

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1720 Harrison Street
Hollywood, Florida 33020

MIAMI REVIEW — 371-4853 — 377-3721

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On Petition for Writ of Certiorari to the Supreme Court of the State of Florida

---

BRIEF FOR RESPONDENT IN OPPOSITION

INTRODUCTORY STATEMENT

Respondent, City of Hollywood, a municipal corporation of the State of Florida, prays that the petition for writ of certiorari be denied. In this brief in opposition reference will be made to petitioners' appendix and the symbol "A" with a number designation will be respondent's sole reference to the record below.

JURISDICTION

The jurisdictional requisites are not accepted by the respondent, as will be more fully discussed in respondent's argument. The judgment for which review is sought is not a final judgment under §1257, 28 USCA 144: "*Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court . . .* " (Emphasis Added)

ARGUMENT

A. THERE BEING NO FINAL JUDGMENT — JURISDICTION IS ABSENT

It is submitted that the judgment below lacks the finality requisite to the jurisdiction of the Court. 28 U.S.C. §1257. It is well settled that only final judgments that completely dispose of the subject matter of the litigation and the causes of action may be reviewed. For example, in *Grays Harbor Logging Co. v. Coats-Fordney Co.*, 243 U.S. 251, 37 S.Ct. 295, 61 L.Ed. 702 (1917) a State court judgment that a taking by eminent domain is for public use, where determination and assessment of compensation or change of title has not yet taken place, is not a final

judgment for purpose of certiorari review. See also *Whitus v. Georgia*, 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed. 2d 599 (1967); *Arnold v. U. S.*, 263 U.S. 427, 44 S.Ct. 144, 68 L.Ed. 371 (1923).

At bar, four counts of a seven-count complaint were dismissed without leave to amend. (A. 15) There has been no trial and petitioners candidly admit that the remaining counts will be tried later this year. (p. 4, pet. bf.) The order at bar was appealed to the Florida courts pursuant to an interlocutory appeal under Rule 4.2, 32 F.S.A. 244. After trial a decision favorable to petitioners on any of the three counts in the trial court would later moot any decision on the merits of the petition herein.

The necessity for finality in addition to avoiding needless tasks has a sound basis in judicial administration. As pointed out by Justice Frankfurter in *Radio Station WOW, Inc. v. Johnson*, 366 U.S., 120, 132; 65 S.Ct. 1475, 89 L.Ed. 2093, 2097 (1945):

> "Since its establishment, it has been a marked characteristic of the Federal judicial system not to permit an appeal until a litigation has been concluded in the court of first instance. . . . This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice. Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for Federal appellate jurisdiction. This prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the

> decision of a State court. Here we are in the realm of potential conflict between the courts of two different governments. And so, ever since 1789, Congress has granted this Court the power to intervene in State litigation only after 'the highest court of a State in which a decision in the suit could be had' has rendered a 'final judgment or decree.' Section 237 of the Judicial Code, 28 USCA §344(a), 8 FCA title 28, §344(a). This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our Federal system."

As stated by Justice Harlan in his dissent in *Mercantile National Bank v. Langdeau*, 371 U.S. 555; 83 S.Ct. 520, 9 L.Ed. 2d 523, 535 (1963):

> "Thus this is not a situation in which what remains to be done in the State courts is a mere formality, or in which the appellants concede that their whole case must stand or fall on the federal claim. . . . Here, a victory for appellants on the merits could clearly moot the federal question before us today."

In their challenge of respondent's zoning ordinances, the petitioners have presented a multi-cause attack. Count I alleges that the ordinance is unconstitutional *vel non* (A. 9). Count VI is the traditional challenge that the ordinance is "arbitrary, unreasonable, discriminatory and confiscatory" (A. 10). Count III alleges an equitable estoppel against respondent from enforcing the ordinance against the petitioners. (A. 9)

The relief requested under the causes yet to be tried is clearly alternative to the claim for "inverse condemnation" at bar. It is patent that a final determination after trial that respondent's ordinance is unconstitutional or that respondent is equitably estopped to enforce the ordinance, would render moot the petition *sub judice.*

B. INVERSE CONDEMNATION IS NOT AN AVAILABLE REMEDY

Not only do the petitioners lack a final judgment upon which to invoke the jurisdiction of this court, but they seek relief which is without precedent. They seek to change, *judicially*, what has been the exclusive prerogative of the legislature — the authority to pass zoning and land use controls.

Assuming, but not conceding, that the judgment below has the requisite finality to invoke jurisdiction, certiorari should nonetheless be denied for it is clear that "inverse" or "reverse" condemnation is not an available remedy to the petitioners. The traditional remedies which allege a zoning restriction to be unconstitutional have been pled and will be heard when the trial court gets to the merits. It is the respondent's position that petitioners must look to these remedies for the relief and may not prong the respondent with the spectre of a multi-million dollar eminent domain jury trial.

The police power is the authority for zoning regulations exercised by the State and its municipal subdivisions to promote the public welfare. So essential is the police power that it has been termed one of "the least limitable of the powers of government." 6, *McQuillan, Municipal*

Corporations, §24.03 at 446 (3rd Ed. 1949). The validity of an exercise of the police power depends upon whether it is being used to protect the health, safety, morals or general welfare of the public and whether or not the means employed have a "substantial relation to the public objects which the government may legally accomplish . . ." 6, *McQuillan, supra*, at 572. It is admitted that zoning classifications may have a diminishing effect upon the value of private property, but the governmental protection of private property does not include payment of just compensation.

The dichotomy of the police power and the power of eminent domain was evident and consequently the Florida District Court of Appeal, Fourth District, was quite correct in its refusal to allow a jury trial to award damages to compensate an alleged injury caused by the enactment of a zoning ordinance:

> "We hold that enactment of a zoning ordinance under the exercise of police power does not entitle the property owner to seek compensation for the taking of the property through inverse condemnation." (at A. 3)

In so holding, the district court recognized the distinction between a taking of private property for public use in the exercise of eminent domain, and the regulation of the use of property under the police power. There is a crucial distinction between compelling an owner to furnish a public benefit on the one hand, and restricting his privileges in order to prevent him from imposing a burden upon his neighbors, upon the other.

1, *Nichols on Eminent Domain* (3rd ed.) pp. 69-70, §1.42(2), states:

> "In the exercise of eminent domain property or an easement therein is taken from the owner and applied to public use because the use or enjoyment of such property or easement therein is beneficial to the public. In the exercise of the police power the owner is denied the unrestricted use or enjoyment of his property, or his property is taken from him because his use or enjoyment of such property is injurious to the public welfare."

Freund, The Police Power, Public Policy and Constitutional Rights, 546-547 (1904), states:

> "§511. Difference between police power and eminent domain, and principle of compensation.—The constitutional prohibition against taking property for public use without compensation, applies to injury and destruction as well as to appropriation, and it applies no matter for what purpose the property is taken. If it is recognized that a change of grade entitles to damages, the right cannot be denied on the ground that the change was demanded by considerations of public safety. . . . "
>
> "If we differentiate eminent domain and police power as distinct powers of government, the difference lies neither in the form nor in the purpose of taking, but in the relation which the prop-

> erty affected bears to the danger or evil which is to be provided against.
>
> "Under the police power, rights of property are impaired not because they become useful or necessary to the public, or because some public advantage can be gained by disregarding them, but because their free exercise is believed to be detrimental to public interests; it may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful, or as Justice Bradley put it, because 'the property itself is the cause of the public detriment.'
>
> "From this results the difference between the power of eminent domain and the police power, that the former recognizes a right to compensation, while the latter on principle, does not."

This Court has consistently held (albeit too infrequently) the zoning regulations and land use controls are legitimate applications of the police power. *Euclid v. Amber Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); *Goreib v. Fox*, 274 U.S. 603, 47 S.Ct. 675, 71 L.Ed. 1228 (1927); *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d (1962).

Most recently the Court in *Village of Belle Terre v. Boraas*, ___ U.S. ___, 94 S.Ct. 234, 39 L.Ed.2d 797 (1974) recognized that application of the police power may have an unrecompensed monetary loss to a landowner:

"A zoning ordinance usually has an impact on the value of the property which it regulates. But in spite of the fact that the precise impact of the ordinance sustained in *Euclid* on a given piece of property was not known, 272 US, at 397, 71 L.Ed. 303, 54 ALR 1016, the Court, considering the matter a controversy in the realm of city planning, sustained the ordinance. Here we are a step closer to the impact of the ordinance on the value of the lessor's property. He has not only lost six tenants and acquired only two in their place; it is obvious that the scale of rental values rides on what we decide today. When *Berman* reached us it was not certain whether an entire tract would be taken or only the buildings on it and a scenic easement. 348 US, at 36, 99 L.Ed. 27. But that did not make the case any the less a controversy in the constitutional sense. When Mr. Justice Holmes said for the Court in *Block v. Hirsh*, 256 US 135, 155, 65 L.Ed. 865, 41 S.Ct. 458, 16 ALR 165, 'property rights may be cut down, and to that extent taken, without pay,' he stated the issue here. As is true in most zoning cases, the precise impact on value may, at the threshold of litigation over validity, not yet be known."

Justice Marshall, while dissenting, agreed:

"I would also agree with the majority that local zoning authorities may properly act in further-

> ance of the objectives asserted to be served by the ordinance at issue here: restricting uncontrolled growth, solving traffic problems, keeping rental costs at a reasonable level, and making the community attractive to families. The police power which provides the justification for zoning is not narrowly confined."

If a governing authority had to pay for its right to limit the use of land, we would find payment being required for setback controls, height limitations, parking regulations, and safety requirements. The result would be bankruptcy or, more probably, no restriction on land use. This is truly a revolutionary concept. As recently stated by the Supreme Court of California:

> "If a governmental entity and its responsible officials were held subject to a claim for inverse condemnation merely because a parcel of land was designated for potential public use on one of these several authorized plans, the process of community planning would either grind to a halt, or deteriorate to publication of vacuous generalizations regarding the future use of land. We indulge in no hyperbole to suggest that if every landowner whose property might be affected at some vague and distant future time by any of these legislatively permissible plans was entitled to bring an action in declaratory relief to obtain a judicial declaration as to the validity and potential effect of the plan upon his land, the courts of this state would be inundated with futile legislation. It is clear, under all the circumstances, that plaintiff has not stated a cause

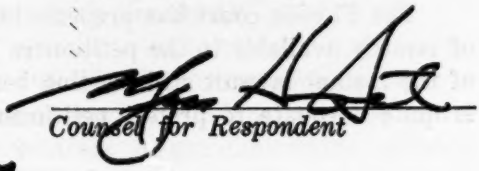
> of action against the county defendants for either declaratory relief or inverse condemnation." *Selby Realty Company v. City of San Buenaventura*, Sup., 109 Cal. Rptr. 700, 805, 806 (1973)

The Florida court has properly held that the arsenal of remedy available to the petitioners in the other counts of the instant lawsuit still pending before the trial court is quite adequate to protect petitioners' rights.

CONCLUSION

For the foregoing reasons, petitioners' application for a writ of certiorari should be denied.

Respectfully submitted,

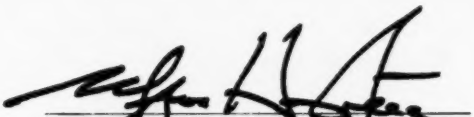


Counsel for Respondent

Dated: August 7th, 1974

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Brief For Respondent in Opposition have been furnished by U.S. Mail prepaid on this 7th day of Aug., 1974 to John R. Lawson, Jr., Post Office Box 1288, 610 Florida Avenue, Tampa, Florida, 33601, Counsel for Petitioners.



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